

STATE OF MICHIGAN
DEPARTMENT OF LABOR & ECONOMIC GROWTH
OFFICE OF FINANCIAL AND INSURANCE REGULATION
Before the Commissioner of Financial and Insurance Regulation

In the matter of

XXXXX

Petitioner

File No. 91565-001

v

Blue Cross Blue Shield of Michigan
Respondent

/

Issued and entered
this 20th day of November 2008
by Ken Ross
Commissioner

ORDER

I
PROCEDURAL BACKGROUND

On August 5, 2008, XXXXX, authorized representative of XXXXX (Petitioner), filed a request for external review with the Commissioner of Financial and Insurance Regulation under the Patient's Right to Independent Review Act (PRIRA), MCL 550.1901 *et seq.* The Commissioner reviewed the request and accepted it on August 12, 2008.

The Petitioner is enrolled for health coverage through the Michigan Education Special Services Association (MESSA). The coverage is underwritten by Blue Cross Blue Shield of Michigan (BCBSM). The Commissioner notified BCBSM of the external review and requested the information used in making its adverse determination. The Commissioner received BCBSM's response on August 21, 2008.

The issue in this external review can be decided by a contractual analysis. The contract here is the MESSA *Super Care 1 2003 Revision Plan Coverage Booklet* (Super Care 1 booklet). The Commissioner reviews contractual issues pursuant to MCL 550.1911(7). This matter does not

require a medical opinion from an independent review organization.

II FACTUAL BACKGROUND

The Petitioner received occupational therapy (CPT code 97113, aquatic therapy) provided by XXXXX, OTR, from October 9, 2007, through November 16, 2007. BCBSM denied coverage for this therapy because it believes it is not a covered benefit.

The Petitioner appealed BCBSM's decision to deny coverage. BCBSM held a managerial-level conference on July 16, 2008, and issued a final adverse determination dated July 22, 2008.

III ISSUE

Is BCBSM required to cover the Petitioner's occupational therapy from October 9, 2007, through November 16, 2007?

IV ANALYSIS

Petitioner's Argument

The Petitioner indicates that this case is a continuation of a dispute between the Petitioner's family and BCBSM that has already been adjudicated and resolved in the Petitioner's favor in two XXX circuit court cases (XXXXX v BCBSM, XXXXX, and XXXXX v BCBSM, XXXXX). Those two cases were appeals of the Commissioner's orders in PRIRA cases 86389 and 85560 respectively and also apparently involved occupational therapy provided by XXXXX. In both cases, the circuit court ordered BCBSM to pay for the therapy at issue.

The Petitioner argues that the occupational therapy in this case (from October 9, 2007, through November 16, 2007) was provided under the same terms of coverage as the earlier cases - there is no indication that her coverage has been changed. Therefore, the Petitioner believes that the occupational therapy in this case is also a covered benefit and BCBSM is required to pay for it.

BCBSM's Argument

BCBSM acknowledges that the circuit court ordered it to cover occupational therapy

provided to XXXXX and XXXXX. However, BCBSM says the circuit court decisions were based at least in part on the following language quoted in the Commissioner's decisions in cases 86389 and 85560:

15.3 Occupational Therapy

Services are paid at 90 percent of the approved amount after you have met your deductible.

Services must be performed by:

- A doctor
- An occupational therapist
- An occupational therapy assistant under the direct supervision of an occupational therapist
- An athletic trainer under the supervision of an occupational therapist

BCBSM says this language is from another coverage plan, the *MESSA Choices Certificate*, and not from the Super Care 1 booklet that defines the Petitioner's health care benefits.¹ Both are MESSA benefit plans. The Super Care 1 booklet lists covered therapy services in *Section 15: Therapy Benefits* (page 17-18). These therapies are covered:

Physical therapy
Speech and Language Pathology Services
Chemotherapy
Radiation Therapy
Hemodialysis
Outpatient Psychotherapy
Outpatient Substance Abuse Therapy
Vision Therapy Services
Allergy Therapy Services

Occupational therapy is not included in this list. BCBSM says occupational therapy is only covered in the Super Care 1 booklet under Section 18.1, "Home Health Care." According to the documentation provided, the Petitioner received her occupational therapy at a YMCA, not from a home health care agency. Since the Petitioner did not receive her occupational therapy from a home health care agency, BCBSM says Section 18.1 does not apply.

1. This language was provided in error by BCBSM. The Commissioner does not find this language in MESSA *Super Care*

BCBSM also indicated that it has reason to believe that the Petitioner is the sister-in-law of therapist XXXXX. If so, then BCBSM says the occupational therapy that is the issue in this case is an excluded benefit under this provision in *Section 20: Exclusions and Limitations* (page 25).

The following exclusions and limitations apply to the Super Care 1 2003 Revision plan. These are in addition to limitations appearing elsewhere in this booklet:

* * *

- services, supplies or treatment provided by an immediate relative or by anyone who customarily lives in the member's household. For purposes of coverage under this plan, an immediate relative is a spouse, parent, sibling or child of the covered person or a mother-in-law, father-in-law, brother-in-law, sister-in-law or daughter-in-law of the covered person

BCBSM believes that under the language of the Super Care 1 booklet the Petitioner's occupational therapy is not a covered benefit since it was not provided by a home health agency or because it was provided by an immediate family member.

Commissioner's Review

The Commissioner reviewed the information provided, including the previous PRIRA and circuit court decisions involving the Petitioner's family and occupational therapy provided by Newmeyer.

The Commissioner first finds that the Petitioner's health care benefits are defined in the MESSA *Super Care 1 2003 Revision Plan Coverage Booklet*. The Petitioner does not dispute this fact. Therefore, it is the terms and conditions of that booklet that must guide the Commissioner's resolution of this case. Further, there appears no dispute that the Petitioner received occupational therapy from XXXXX. (Occupational therapy is specifically defined in the Super Care 1 booklet and occupational therapy benefits are limited to home health care.)

The Petitioner argues that the doctrine of *res judicata* applies in this case because the issue of coverage of occupational therapy under the Petitioner's certificate has been decided (twice) by the XXX circuit court. The Commissioner rejects that argument. The circuit court orders that were

entered in the prior cases are conclusory in nature and do not explain the rationale for the decision reached. They make no fact-finding nor do they interpret the Petitioner's certificate. Moreover, the Commissioner's previous PRIRA decisions apparently relied on language provided by BCBSM dealing with coverage for occupational therapy that is not included in the Petitioner's Super Care 1 booklet and therefore cannot apply in this case. It appears that the circuit court may have based its reversals of the Commissioner's decisions, at least in part, on that inapplicable language. If so, the Commissioner is not obligated to compound the error here by relying on language that is not in the Petitioner's contract.

The Super Care 1 booklet does not include occupational therapy in the list of covered therapy benefits in Section 15 on pp. 17-18. The booklet only refers to occupational therapy as part of the home health care benefit and specifically requires home health care benefits to be provided by a home health care agency. No information was provided that indicates that Petitioner's occupational therapy was provided by such an agency. On the contrary, the therapy was not provided at home but rather at the local YMCA. Therefore, the Petitioner's occupational therapy provided by XXXXX is not a covered benefit under the terms and conditions of the Super Care 1 booklet.

BCBSM also said that it had reason to believe XXXXX is the Petitioner's sister-in-law. If true, any therapy from XXXX would not be covered because care from an immediate relative (i.e., sister-in-law) is excluded under the terms of the Super Care 1 booklet (see the exclusion in Section 20 on page 25, quoted above). However, BCBSM provided no information on which the Commissioner could base such a finding.²

The Commissioner concludes and finds that BCBSM correctly applied the terms and conditions of the booklet when it denied coverage for the Petitioner's occupational therapy provided by XXXXX since it was not provided by a home health agency.

2. BCBSM acknowledged that it raised this issue to preserve it in case of another judicial appeal.

**V
ORDER**

BCBSM's final adverse determination of July 22, 2008, is upheld. BCBSM is not required to cover the Petitioner's occupational therapy from XXXXX from October 9, 2007, through November 16, 2007.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this Order may seek judicial review no later than sixty days from the date of this Order in the circuit court for the county where the covered person resides or in the circuit court of Ingham County. A copy of the petition for judicial review should be sent to the Commissioner of the Office of Financial and Insurance Regulation, Health Plans Division, Post Office Box 30220, Lansing, MI 48909-7720.